

JOHN D. GIFFIN, CASB NO. 89608
john.giffin@kyl.com
JOSEPH A. WALSH II, CASB NO. 143694
joe.walsh@kyl.com
JOHN C. COX, NO 197687
john.cox@kyl.com
NICOLE S. BUSSI, CASB NO. 252763
nicole.bussi@kyl.com
KEESAL, YOUNG & LOGAN
A Professional Corporation
450 Pacific Ave
San Francisco, California 94133
Telephone: (415) 398-6000
Facsimile: (415) 981-0136

Attorneys for Defendants, Counterclaimants, and Third Party Claimants:
REGAL STONE LIMITED., FLEET MANAGEMENT LTD.
in personam, M/V COSCO BUSAN *in rem*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. C 07 06045 (SC)
)	
Plaintiff,)	IN ADMIRALTY
)	
vs.)	PROPOSED CASE MANAGEMENT
)	PLAN AND PROPOSED ORDER
M/V COSCO BUSAN, LR/IMO Ship. No.)	
9231743 her engines, apparel, electronics,)	
tackle, boats, appurtenances, etc., <i>in rem</i> ,)	DATE: September 5, 2008
THE SHIPOWNERS' INSURANCE &)	TIME: 10:00 a.m.
GUARANTY COMPANY LTD., REGAL)	JUDGE: Hon. Samuel Conti
STONE LIMITED, FLEET MANAGEMENT,)	
LTD., AND JOHN COTA, <i>in personam</i> ,)	
)	
Defendants.)	

MEETING

Pursuant to the Court's Order and local Rule 16-9, the following parties and their representatives conferred on August 25, 2008:

A. Appearing on behalf of Plaintiff United States:

R. Michael Underhill, United States Department of Justice, Torts Branch, Civil Division;

Bradley R. O'Brien, United States Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section.

B. Appearing on behalf of Defendants M/V COSCO BUSAN ("COSCO BUSAN"), Regal Stone Limited (Regal Stone), and Fleet Management Ltd. ("Fleet Management"):

John D. Giffin, Joseph A. Walsh II, John C. Cox and Nicole S. Bussi, Keesal Young & Logan.

C. Appearing on behalf of Defendant John Cota ("Cota"):

Walter G. Coppenrath, Jr., and George M. Jones, Coppenrath & Associates.

I. JURISDICTION AND SERVICE

Jurisdiction: The United States brought this suit and has alleged jurisdiction pursuant to the following statutes:

- a. 28 U.S.C. § 1345;
- b. The National Marine Sanctuaries Act ("NMSA"), 16 U.S.C. §§ 1431, *et seq.*, including sections 1437 and 1443;
- c. The Park System Resource Protection Act ("PSRPA"), 16 U.S.C. §§ 19jj, *et seq.*, including section 19jj-2; and
- d. The Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701, *et seq.*, including section 2717.
- e. The Clean Water Act, 33 U.S.C. § 1321(b)(7), as amended by OPA (for judicially assessed civil penalties).

Service: The United States has served all parties.

Counterclaim and Third Party Claim:

In conjunction with their Answer to the United States' First Amended Complaint,

1 Regal Stone and Fleet Management filed a Counterclaim against the United States. The
2 United States has answered the Counterclaim, denying liability.

3 Regal Stone and Fleet Management also asserted a Third Party claim against the
4 State of California pursuant to FRCP 14(c) seeking to require the State of California to
5 answer the complaint of the Plaintiff United States as if the latter had sued the State of
6 California. Regal Stone and Fleet Management amended their Third Party Claim and
7 also added Dr. Charles Calza, M.D. as a third party defendant, which was filed on
8 August 21, 2008. The State of California's responsive pleading is now due on or about
9 September 10, 2008 and Dr. Calza's response is due September 15, 2008.

10 In addition to any other rights under the Fed.R.Civ.P, the United States reserves
11 the right to challenge Regal Stone's and Fleet Management's Amended Third-Party
12 Complaint, as recently filed.

13 In a related action, 3:08-2268(SC), Regal Stone was sued by the State of
14 California, acting by and through the Department of Transportation, for which it has
15 answered and filed a counter claim against the State of California. Regal Stone filed an
16 amended answer to the complaint and a counterclaim on August 21, 2008. Regal Stone
17 will move to consolidate that action with this case on the basis that both arise out of the
18 same Incident or occurrence and to the extent that the State of California may also seek
19 natural resource damages also sought by the United States.

20 II. FACTS

21 The United States' complaint alleges that on November 7, 2007, the COSCO
22 BUSAN allided with the base and/or fendering system of the "Delta Tower," one of the
23 support towers of the western span of the San Francisco-Oakland Bay Bridge (the
24 "Incident"). The allision with the Bay Bridge resulted in a rupture of the COSCO
25 BUSAN's fuel tanks, thereby allowing fuel oil to be discharged into navigable waters of
26 the United States. The United States contends that the discharge impacted adjoining
27 shorelines of San Francisco Bay, the Pacific Ocean, the Gulf of the Farallones National
28 Marine Sanctuary and the Monterey Bay National Marine Sanctuary, and units of the

1 National Park System, including, but not limited to, the Golden Gate National
2 Recreation Area, Point Reyes National Seashore, and the San Francisco Maritime
3 National Historic Park.

4 The United States' complaint alleges that at the time of the Incident, Regal Stone
5 was the owner of the COSCO BUSAN; that Fleet Management was the operator of the
6 vessel; that Cota was the pilot of COSCO BUSAN. With respect to Regal Stone and
7 Fleet, and based upon information made public in documents filed in the criminal case
8 pending against Cota, the United States further alleges, inter alia, that said Defendants'
9 crewmen of the vessel altered and/or deleted and/or created anew various documents
10 and material evidence and, with respect to operation of the vessel itself, the United
11 States further alleges that crew of the vessel were not trained by Fleet or Regal with
12 respect to performance of essential duties aboard the vessel, including operation of
13 critical navigation equipment.

14 Regal Stone and Fleet Management generally allege in their Counterclaims
15 against the United States that the United States is liable for the negligent licensing of
16 Pilot John J. Cota, insofar as it failed to determine that Pilot Cota was not medically fit
17 for duty pursuant to applicable regulations and procedures. Regal Stone and Fleet
18 Management's Counterclaims allege that the United States Coast Guard is responsible
19 for the proper licensing of Pilot Cota and that it failed to adequately perform its
20 responsibilities which proximately caused the Incident and damage to Regal Stone and
21 Fleet Management. Regal Stone and Fleet Management also generally alleged that the
22 United States is liable because its Vessel Traffic Service ("VTS") gave inaccurate and
23 confusing information to the Pilot, failed to properly monitor, advise, warn and direct
24 the Pilot so as to proximately cause the allision. Regal Stone and Fleet Management
25 assert that the United States is liable to them under maritime and common law theories
26 of negligence and that they are entitled to contribution, setoff and recoupment from the
27 United States, as well as other costs, damages, losses and penalties they may incur.

28 Regal Stone and Fleet Management generally allege in a Third Party Rule 14(c)

claim seeking to require the State of California to answer the complaint of the Plaintiff United States as if the latter had sued the State of California, that the State is wholly or in part liable to the United States for its negligently issuance and renewal of the license of Pilot John J. Cota and that the COSCO BUSAN oil spill was proximately caused by the State's failure to use due care in its licensing, supervision and training of Pilot Cota. Regal Stone and Fleet Management claim they are entitled in whole or in part to contribution, indemnification, and/or reimbursement for their costs, damages, losses and penalties they have incurred or may incur as a result of the State's negligence.

In signing this Case Management Plan, none of the parties herein admit, nor shall they be deemed to have admitted, any allegation made by any other party and, conversely, each party reserves any and all claims, rights, denials, and defenses as may be set out by way or answer, responsive pleading, and/or motion.

III. LEGAL ISSUES

United States' Position:

The Defendants' liability and damages, in personam and in rem, without limitation, declaratory relief, potential forfeiture, interest, and disbursements sustained by the United States under the causes of action and various statutes, including judicially assessed civil penalties under the Clean Water Act, 33 U.S.C. § 1321(b)(7) pled in the United States' First Amended Complaint. .

The United States is submitting this proposed Case Management Order solely as it relates to the instant civil judicial action and solely as a result of the Court's Orders concerning the Case Management Plan and Case Management Conference.

Defendants' COSCO BUSAN, Regal Stone and Fleet Management

Position: Reserving their right to limit liability under 33 U.S.C. §§ 2704, 2708 and 2713, the position of Defendants COSCO BUSAN, Regal Stone and Fleet Management is that the United States and State of California are liable for their proportionate share of all damages and costs resulting from the Cosco Busan allision.

1 **IV. MOTIONS**

2 The parties are in general agreement that this action, including discovery,
3 presently should be stayed (with the exception of the depositions of certain crewmembers
4 of COSCO BUSAN who presently remain in the United States as a result of criminal
5 proceedings pending against Defendant Cota and Defendant Fleet as of July 22, 2008).
6 Trial in the latter action is currently set for November 7, 2008.

7 **The United States' Position:**

8 At the appropriate time, the United States may file dispositive motions relating to
9 the Counterclaims asserted by Regal Stone and Fleet Management, as well as potential
10 motions relating to said defendants' alleged right to limit liability under provisions of
11 the Oil Pollution Act of 1990.

12 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**
13 **Position:**

14 a. Regal Stone and Fleet Management plan to file a motion to consolidate this
15 action with the related case *People of the State of California v. Regal Stone et al.*, 3:2008-
16 cv-02268-SC.

17 b. Regal Stone and Fleet Management will likely move the Court for an order to
18 consolidate or in the alternative to coordinate discovery in this matter with the other
19 related actions identified in Section X.

20 c. Regal Stone and Fleet Management reserve their right to file a motion to join
21 any indispensable party under Fed. R. Civ. Proc. 19 as necessary.

22 **Defendant John Cota's Position:** Cota may move to the stay this action or at
23 least any discovery directed to him in that the United States Department of Justice has
24 initiated a criminal proceeding against him presently set for trial in October 2008.
25 Consequently, any civil discovery requiring responses by Captain Cota would violate his
26 Fifth Amendment rights. Defendant Cota also reserves his right to move for a change of
27 venue.
28

1 **V. AMENDMENT OF PLEADINGS**

2 **United States' Position:**

3 The United States reserves the right to amend its pleading based upon
4 information discovered following the filing of the complaint, including, but not limited to,
5 information pertaining to acts and omissions of Fleet Management, Regal, and their
6 crewmen employees, as well as upon information yet to be discovered.

7 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**
8 **Position:**

9 Defendants Regal Stone and Fleet Management have amended the Third Party
10 14(c) claim against the State of California.

11 **VI. EVIDENCE PRESERVATION**

12 The parties acknowledge and agree that the Federal Rules of Civil Procedure,
13 specifically 26(f) and this District Court's Standing Order effective since March 1, 2007
14 are sufficiently adequate with respect to preservation of evidence. Exceptions and
15 special circumstances are addressed in the proposed Case Management Plan. The
16 parties advise that they have taken and will continue to take appropriate steps to
17 preserve relevant evidence.

18
19 **VII. LITIGATION AND INITIAL DISCLOSURES**

20 The parties believe that this is a complex case, but does not believe that the
21 procedures of the Manual for Complex Litigation should be utilized.

22 The parties believe that in light of their proposal that the instant litigation be
23 stayed, and in the interest of efficiency and judicial economy, that a proposed detailed
24 case management be submitted to the Court after the stay of this litigation is no longer
25 in effect.

26 The parties intend that such future case management order shall include a
27 phased approach to litigation, with the natural resource damage component of this case
28 litigated in a latter phase. The parties further intend that initial disclosures to the

1 extent not yet made, fact and expert discovery (with the exception of certain crewmen, as
2 previously discussed), and trials shall be conducted during the appropriate phase. The
3 specific requirements shall be determined in the future case management order.
4

5 **VIII. DISCOVERY**

6 A federal criminal case pends against Fleet Management and Cota. Trial in that
7 case presently is set for mid-November of this year, although Fleet advises that it will
8 seek to have trial in that matter moved to late February 2009. The parties therefore
9 believe that a stay of discovery in this action presently is appropriate, subject to an
10 exception concerning crewmen of COSCO BUSAN who remain in the United States as
11 material witnesses. In May of 2008, the civil depositions of three crew members were
12 conducted in accordance with the stipulation of the parties and order of the Court on
13 May 9, 2008. Three additional crew members remain in the United States as material
14 witnesses. Scheduling of trial testimony of certain of those witnesses under Rule 15 of
15 the Fed.R.Crim.P. is scheduled for early October. The Parties are interested in
16 obtaining the deposition testimony of these three as yet non-deposed crew members as
17 soon as they are released as material witnesses, but before they leave the United States
18 on the same or similar terms as the May 9th stipulation. The witnesses are represented
19 by independent counsel and are not a party to this or any of the related actions. It is the
20 parties' understanding that the remaining crew members are currently invoking their
21 5th Amendment rights.
22

23 The parties believe that in light of their proposal that the instant litigation be
24 stayed, and in the interest of efficiency and judicial economy, that a proposed detailed
25 case management plan concerning discovery and related matters be submitted to the
26 Court after the stay of this litigation is no longer in effect.

27 The parties intend that such future case management order shall include a
28 phased approach to litigation, with the natural resource damage component of this case
litigated in a latter phase. The parties further intend that initial disclosures to the

1 extent not yet made, fact and expert discovery (with the exception of certain crewmen, as
 2 previously discussed), and trials shall be conducted during the appropriate phase. The
 3 specific requirements shall be determined in the future case management order.
 4

5 **IX. CLASS ACTIONS**

6 Not applicable to the present action, C07-6045 SC, but see section X below with
 7 respect to Chelsea, LLC v. Regal Stone, Ltd. et al, Civil Action No. 07-5800. There is
 8 also a competing class action being pursued in state court.
 9

10 **X. RELATED CASES**

11 *Chelsea, LLC et al v. Regal Stone, Ltd. et al.*, Civil Action No. 07-5800; and
 12 *Shogren Living Trust. et al v. Regal Stone. Ltd. et al.* Civil Action No. 3:07-5926
 13 (dismissed).
 14

15 *The Continental Insurance Co. v. Regal Stone, Ltd. et al.*, No. 3:08-2052

16 *The People of the State of California, Acting by and through the Department of*
 17 *Transportation v. Regal Stone, Ltd. et al.*, No. 3:08-2268

18 **XI. RELIEF**

19 **United States' Position:**

20 The United States seeks response costs and damages, without limitations,
 21 declaratory relief, potential forfeiture, interest, disbursements sustained by the United
 22 States, and reserves the right to assert claims for penalties, as aforesaid.

23 Natural resource damages will be determined through a natural resource
 24 damages assessment (NRDA), which is currently being conducted pursuant to
 25 procedures contained in 15 CFR, Part 990. Pursuant to this process, data is being
 26 collected and studies undertaken to determine the extent of injuries to natural resources
 27 and will be used to select and "scale" restoration projects that will compensate the public
 28 for injuries to resources and their losses or services they provide. The cost of these
 restoration projects will determine the amount of damages. The NRDA process has to

1 date identified seven categories of potentially injured resources: birds, mammals, fish,
 2 human uses and cultural resources, and rocky intertidal/sandy beach, and saltmarsh/
 3 eelgrass habitats. Currently identified injuries include thousands of oiled birds, nearly
 4 100 miles of oiled shoreline and habitat, and substantial lost human use days at
 5 beaches, parks, and other recreation areas in the vicinity of the spill. Data collection,
 6 however, is still ongoing and the scope and extent of the injuries may increase. The
 7 United States intends that the ongoing NRDA process be sufficiently complete to allow
 8 the phased approach to litigation to result in efficient litigation and preserve the court's
 9 and the parties' resources.

10 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management**

11 **Position:**

12 Defendants COSCO BUSAN, Regal Stone and Fleet Management generally deny
 13 that they are liable to the United States as claimed.

14 Defendants COSCO BUSAN, Regal Stone and Fleet Management seek
 15 contribution, setoff, and recoupment of its costs, damages, losses and penalties from the
 16 United States and any additional relief Defendants are entitled to by law or in equity.

17 Defendants COSCO BUSAN, Regal Stone and Fleet Management seek damages,
 18 in forms of contribution and indemnification for costs, damages, losses and penalties
 19 from the State of California and any additional relief Defendants are entitled to by law
 20 or in equity.

21 **Defendant John Cota's Position:**

22 Defendant Cota generally denies that the United States is entitled to the relief it
 23 is seeking against him. Defendant Cota also contends that the Cosco Busan, Regal
 24 Stone and Fleet Management are obligated by statute to defend him and hold him
 25 harmless from all claims and damages.

27 **XII. SETTLEMENT AND ADR**

28 The parties have not participated in ADR and believe it is premature to do so.

1 They believe however, that certain aspects, particularly with respect to natural resource
 2 damages, may lend themselves to resolution. Upon submission of a phase litigation
 3 proposal, the parties will re-evaluate and address ADR.
 4

5 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

6 The United States does not consent to utilizing a magistrate judge.
 7

8 **XIV. OTHER REFERENCES**

9 The United States does not consent to utilizing binding arbitration, a special
 10 master, or the Judicial Panel of Multi District Litigation.
 11

12 **XV. NARROWING OF ISSUES**

13 The parties believe a phase approach to the litigation will assist in narrowing the
 14 issues.
 15

15 **United States' Position:**

16 The United States may file dispositive motions relating to the counterclaims
 17 asserted by Regal Stone and Fleet Management, as well as potential motions relating to
 18 said defendants' alleged right to limit liability under the provisions of the Oil Pollution
 19 Act of 1990.
 20

20 **Defendants' COSCO BUSAN, Regal Stone and Fleet Management** 21 **Position:**

22 Defendants COSCO BUSAN, Regal Stone and Fleet Management contend that
 23 the United States and the State of California played a roll in the COSCO BUSAN oil
 24 spill and must be held accountable for their actions and contribute the appropriate
 25 amount of damages as a result. The phased approach to this litigation will assist in
 26 narrowing of these issues. Defendants also believe that this case must be consolidated
 27 with *The People of the State of California, acting by and through the Department of*
 28 *Transportation v. Regal Stone, Ltd. et al.*, No. 3:08-2268 and intends to bring an

appropriate motion. Defendants also request that the litigation be suspended until the conclusion of the criminal proceedings.

Defendant John Cota's Position:

Defendant Cota also believes the phased litigation approach described herein shall narrow the issues. Defendant Cota also contends that all discovery against him should be stayed pending the final outcome of the pending criminal charges against him by the federal government.

XVI. EXPEDITED SCHEDULE

Not applicable.

XVII. SCHEDULING

See above.

XVIII. TRIAL

The parties intend to propose a phased approach to the litigation. It is premature to give an estimate of the length for trial at this point given the current criminal proceedings and request for stay due to the criminal proceedings. The parties have not reached agreement on whether the case could and/or would be tried to a jury or to the Court. Regal Stone and Fleet Management seek a jury trial.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS:

United States' Position:

Not required

Defendants COSCO BUSAN, Regal Stone and Fleet Management Position:

Defendants have filed their Certificates of Interested Entities or Persons required by Local Rule 3-16.

Defendant Cota Position:

1 Defendant Cota has filed his Certificate of Interested Entities or Persons required
2 by Local rule 3-16.

3 **XX. CONCLUSION**

4 The parties propose that the Court adopt the foregoing Case Management Plan.
5 At the appropriate time (i.e., depending on the circumstances relating to the criminal
6 proceedings) the parties will come back to the Court for further scheduling and case
7 management.
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[PROPOSED] ORDER

The Court, having reviewed the foregoing Proposed Case Management Plan hereby ORDERS that the schedules and agreements as proposed by the parties as set forth therein are entered as the Case Management Order for this action.

IT IS SO ORDERED.

DATED: _____

UNITED STATES DISTRICT JUDGE

1
2 Dated: _____ KEESAL, YOUNG & LOGAN

3
4 /s/ John Giffin
5 By: JOHN GIFFIN

6 Attorneys for Defendants
7 REGAL STONE, LTD., FLEET MANAGEMENT, LTD.
8 *in personam*, M/V COSCO BUSAN *in rem*

9 Dated: _____ GREGORY KATSAS
10 Acting Assistant Attorney General

11
12 ____/s/ R. Michael Underhill

13 R. MICHAEL UNDERHILL
14 Attorney in Charge, West Coast Office
15 CHAD KAUFFMAN
16 Trial Attorney
17 Torts Branch, Civil Division
18 United States Department of Justice

19 RONALD J. TENPAS
20 Assistant Attorney General
21 Environment and Natural Resources Division

22 /s/ Bradley R. O'Brien
23 BRADLEY R. O'BRIEN
24 Senior Attorney
25 Environmental Enforcement Section
26 United States Department of Justice

27 Attorneys for Plaintiff
28 United States of America

Dated: _____ COPPENRATH & ASSOCIATES

/s/ Walter g. Coppenrath Jr.
By: WALTER G. COPPENRATH, JR.

Attorneys for John Cota

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